FHONG SHENG CHEUNG & ORS

v.

HUAN CHAK CHON & ORS

HIGH COURT MALAYA, IPOH
CLEMENT SKINNER JC
[CIVIL SUIT NO: 22-521-1998]
2 JULY 1999

CIVIL PROCEDURE: *Locus standi - Action for injunction - Claim by defendants that plaintiffs not named beneficiaries in will of deceased - Whether plaintiffs had locus standi to commence action against defendants*

CIVIL PROCEDURE: *Injunction - Interlocutory injunction, application for - Whether facts of case disclosed a bona fide serious issue to be tried - Whether harm resulting from refusal of injunction outweighed harm caused by grant - Whether damages an adequate remedy - Whether defendants would suffer hardship - Delay by plaintiffs in commencing action - Whether defendants prejudiced - Whether justice of case necessitated grant of injunction*

SUCCESSION: *Administration - Action for accounts, application for - Whether plaintiffs had interest under will - Whether defendants legally entitled to deal with assets of deceased*

The plaintiffs and the defendants were the children of one Huam Hock Beng ('the deceased') who passed away and who at the date of his demise was the registered owner of five parcels of land ('the lands').

The plaintiffs applied for two applications. The first application was an interlocutory injunction wherein the plaintiffs sought for two orders: (i) a prohibitory order to prevent the defendants from harvesting, selling or removing any palm oil and other fruit produce from the lands; and (ii) a mandatory order to allow the plaintiffs to enter, harvest and sell the palm oil and other fruit produce from the lands and thereafter to pay all monies received from the sale of the said produce into a trust fund or a fixed deposit account held in the joint names of the plaintiffs and the defendants.

The second application was for an order that the defendants present an account of all dealings and transactions and especially of profit derived from the sale of oil palm and other fruits from the lands.

The defendants argued that: (i) there was a will by the deceased and to grant an injunction would amount to the court displacing the authority of the executors or administrators; (ii) damages was an adequate remedy; (iii) the balance of convenience did not favour the grant of an injunction in that the

defendants' business and earnings would be disrupted which in turn would cause inconvenience and hardship to the defendants especially as the defendants expended large sums of money on the lands and that the *status quo* should be maintained; and (iv) that the plaintiffs delayed about a year in commencing these proceedings without any explanation for the same.

Before the above was considered, the defendants raised a preliminary objection that the plaintiffs had no *locus standi* to commence this application as the deceased left the lands to the defendants in his will.

Held:

[1] There was no dispute that the plaintiffs were children of the deceased, that the deceased was the registered owner of the lands, that the lands were under cultivation of oil palm and fruits and that the defendants took possession of them and were in receipt of the income from the lands. The plaintiffs also questioned the validity of the will and in the meantime filed a petition to be appointed administrators of the estate of the deceased wherein the names of all the plaintiffs were shown as persons interested in the estate of the deceased. On these undisputed facts, the plaintiffs had a law in right to claim to be beneficiaries of the estate of the deceased to entitle them to bring this action and to seek the reliefs prayed for. Thus, the preliminary objection of the defendants was dismissed.

[2] There were *bona fide* serious issues raised which required further investigation. These issues arose out of one question central to the whole case, namely, whether the deceased died leaving a will or died intestate. This gave rise to the following subsidiary issues, *ie*, if the deceased did leave a will whether it was valid, and if it was valid, what were its terms and who were the persons entitled to receive under it.

[3] The harm resulting from the refusal of the injunction far outweighed any harm that might be caused by its grant. The fact that the plaintiffs gave an undertaking in damages was taken into account. However, as the injunction would result in all proceeds of sale being paid into a joint account, the question of the financial standing of the plaintiffs was not of any importance. As opposed to that, to allow the defendants to continue in possession of the lands and to collect the income therefrom immediately called into question the financial ability of the defendants to pay over all sums of money that they might be finally accountable for.

[4] There was no merit in the defendant's submission that to grant an injunction when there was a will would amount to the court displacing the authority of the executors or administrators. This was because the defendants were neither named executors nor appointed as executors or administrators.

[5] Neither was there any merit in the defendants' submission that damages were an adequate remedy. The financial standing of the defendants was already doubted. Further, whilst the defendants claim that loss was quantifiable, they resolutely refused to account for the income from the lands and all moneys that came into their hands. The very process of quantification became questionable.

[6] The *status quo* needed to be preserved was the position that prevailed at the date of the death of the deceased before the acts complained of began. The defendants took over the assets of the estate only after the death of the deceased. To now argue that the court should allow the present *status quo* to continue was untenable.

[7] The defendants' claim that they spent large sums of money on the lands was not established in evidence. Even if this was true, as the defendants were in receipt of all the income from the lands, they were therefore in a position to recoupe any alleged expenditure. The only hardship that the defendants would suffer as a result of the injunction was that they would not be able to pocket the money as they now did.

[8] Although the plaintiffs delayed in bringing these proceedings, the injunction should not be refused on this ground alone as the defendants were not unduly prejudiced by the delay. The delay factor was outweighed by other considerations warranting the grant of an injunction.

[9] As the defendants were not named executors and were not granted probate of the will, the defendants were not entitled to claim that they were legally entitled to deal with the assets of the deceased and that the plaintiffs must establish that they had a sufficient interest under the will to be able to call for an account. The defendants were in no better position than the plaintiffs, *ie*, that they were all beneficiaries of the estate of the deceased.

[Application granted.]

Case(s) referred to:

Arab Malaysian Corporation Builders Sdn Bhd & Anor v. ASM Development Sdn Bhd [1998] 2 CLJ Supp 169 ***(refd)***

Cayne v. Global Natural Resources plc [1984] 1 AER 225 ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 ***(refd)***

Sivanendran v. Markandoo & Anor v. Dr Mahendran Markandoo [1988] 2 MLJ 169 ***(refd)***

Roxy Electric Industries (K) Bhd v. Syarikat Nominee Bumiputra Sdn Bhd [1989] 3 MLJ 231 ***(refd)***

Tang Eng Choon v. Foo Kain Yeun & Anor [1988] 1 MLJ 531 ***(refd)***

Tinta Press Sdn Bhd v. Bank Islam Malaysia Bhd [1987] 2 MLJ 193 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 43 r. 1(3), O. 92 r. 1

For the plaintiffs - Sheanna Shanta Kenneth Velu; M/s Chang Ko Youn, Liew & Co
For the defendants - Manjit Singh; M/s Paramjit & Co

Reported by Usha Thiagarajah

JUDGMENT

Clement Skinner JC:

There are two applications before me, both at the instance of the plaintiffs in this suit. The first application is for an interlocutory injunction (encl. 8) wherein the plaintiffs' seek two orders: one couched in prohibitory terms to prevent the defendants from harvesting or selling or removing any palm oil and other fruit produce from five parcels of land described as Lot 1974, Lot 1980, Lot 6976, Lot 1681, Mukim Sungei Tinggi and Lot 1739, Mukim Tupai, all in the District of Larut and Matang, Perak (hereafter the said lands), and the other couched in mandatory terms to allow the plaintiffs to enter, harvest and sell the palm oil and other fruit produce from the said lands and thereafter to pay all monies received from the sale of the aforementioned produce into a trust fund or fixed deposit account which shall be held in the joint names of the plaintiffs and defendants.

The second application (encl. 5) is for an order that the defendants present an account of all dealings and transactions and especially of profit derived from the sale of oil palm and other fruits from the said lands for the period between November 1997 to date. A similar order is sought in respect of all dealings and transactions of the sale and profit of a firm called Hong Heng (hereafter Hong Heng) from November 1997 to date. At the hearing of this application, counsel for the plaintiffs informed the court that the accounts were being sought only from 18 February 1998 to date.

There are five plaintiffs and three defendants in this suit, all of whom are the children of one Huam Hock Beng (hereafter the deceased) who passed away on 18 February 1998 and who at the date of his demise was the registered owner of all the said lands. The deceased was also the proprietor of a business run under the name and style of Hong Heng.

When the two applications came on for hearing, counsel for the plaintiffs informed the court that the 2nd plaintiff was not interested in pursuing this suit and accordingly the applications were being made on behalf of the 1st, 3rd, 4th and 5th plaintiffs only.

The said lands have been put to agricultural use and are cultivated with oil palm and fruits. The firm of Hong Heng is concerned in wholesale business mainly selling oil palm produce and fruits. Since the demise of the deceased, the defendants have taken possession of the said lands and are enjoying the income therefrom to the exclusion of the plaintiffs. The basis upon which the defendants do so is the existence of an alleged will in which it is claimed the defendants are the sole beneficiaries of. The plaintiffs do not recognise this will and challenge its validity.

The plaintiffs complain that since taking over the said lands, the defendants have been harvesting the oil palm and fruits, thereon and paying the income and proceeds of sale therefrom into the account of Hong Heng which is now registered in the ownership of the 1st and 2nd defendant. The plaintiffs maintain that the said lands rightly form part of the assets of the estate of the deceased and to which they, the plaintiffs, as well as the defendants have a right to claim an interest in being the children of the deceased. Accordingly, the plaintiffs have made a request that the defendants produce accounts in respect of the assets taken over but without success. The 1st plaintiff has also been prevented from entering the said lands by the defendants. The 1st plaintiff claims that prior to the demise of his father, he had since the 1970's been the only son working with the deceased in Hong Heng which was run generally by him. However, sometime in March 1998, after the demise of the deceased he was told to leave Hong Heng.

It is an undisputed fact that since the demise of the deceased, nobody has taken out representation of his estate, whether by way of a grant of probate or by letters of administration. However, on 10 September 1998, the 3rd, 4th and 5th plaintiffs have filed a petition at the High Court, Ipoh, applying to be appointed administrators to the estate of the deceased. The petition is awaiting hearing and has been assigned Petition No. 31-54-1998.

On 13 November 1998, the plaintiffs commenced these proceedings wherein they claim to be beneficiaries to the estate of the deceased and entitled to share in the distribution of his property inclusive of all proceeds of sale derived from the same. On 4 February 1999 the plaintiffs filed the application for accounts and on 8 February 1999 the plaintiffs filed their application for interlocutory injunction.

When the plaintiffs' application for injunction came up for hearing on 10 March 1999 the three defendants appeared in person and requested for an adjournment as they wished to be represented by a lawyer. I acceded to their request and adjourned hearing to 17 March 1999. On that date the defendants were represented by their present counsel who informed the court that as he

had been engaged the day before he required time to file papers to oppose the application. Counsel for the plaintiffs objected to any such adjournment on the grounds that sufficient time had been granted to the defendants to engage counsel and to file an affidavit in reply. I then stood the matter down for a short while and when the matter was called on again, I was informed that the parties had by their counsel agreed that pending the hearing of the plaintiffs' application, an interim order be made in the following terms.

> That a joint account be opened in the name of the 1st plaintiff Fhong Sheng Cheang @ Huam Siak Chin and Huan Chak Chon with the abovementioned persons being signatories to the account wherein all proceeds of sale derived from the said lands are to be paid into and from which the expenses agreed to by the above mentioned persons for the running of the said lands are to be disbursed.

I accordingly made an order in the above terms (hereafter the interim order) and granted the defendants' request for adjournment.

When the application for injunction came on for argument on 13 May 1999, the defendants raised a preliminary objection that the plaintiffs have no *locus standi* to make this application. It was argued that because the deceased had left a will leaving the said lands to the defendants, the said lands rightfully belong to them by reason wherefore the plaintiffs have no *locus standi* to bring this action. It was also counsel's submission that as the plaintiffs had no cause of action against the defendants no injunction could be applied for since an application for an injunction requires the existence of a cause of action and the mere fact that a party can apply for an injunction is in itself not a cause of action. In support of this submission counsel relied on the case of *Arab Malaysian Corporation Builders Sdn Bhd & Anor v. ASM Development Sdn Bhd* [1998] 2 CLJ Supp 169 p. 170.

After hearing arguments on the preliminary objection, I dismissed it. Looking at the pleadings, the affidavits and the exhibits then before me, there was no dispute that the plaintiffs are all children of the deceased, that he was the registered owner of the said lands; that the said lands were under cultivation of oil palm and fruits; that the defendants had taken possession of them and were in receipt of the income from the said lands; and all this taking place whilst no probate had been applied for nor granted to the defendants to lawfully enable them to so deal with the assets of the estate of the deceased. The plaintiffs are questioning the validity of the will and in the meantime the 3rd, 4th and 5th plaintiffs had filed a petition to be appointed administrators of the estate of the deceased wherein the names of all the plaintiffs are shown as being the persons interested in the estate of the deceased. On these undisputed facts, I was satisfied that the plaintiffs had in law a right to claim

to be beneficiaries of the estate of the deceased to entitle them to bring this action and to seek the reliefs prayed for.

This is accordingly what I said in dismissing the defendants' preliminary objection.

> The plaintiffs' claim is based on their being the children of the deceased and on their pending application for letters of administration of the estate of the deceased. The deceased may have left a will but until that question is finally decided, it cannot be said that the plaintiffs have no *locus standi* to bring this action. The cause of action is pleaded in their statement of claim upon which the application for injunction is filed in pursuance of.

Before entering into a consideration of the merits of the application, I remind myself that the orders sought by the plaintiffs consist of both a prohibitory as well as a mandatory injunction. Having said that, it is evident to me that the terms of the mandatory injunction are such that if granted, it would not result in the plaintiffs being granted the whole or substantially the whole of their relief or remedy at an interlocutory stage, nor would it result in the plaintiffs not needing to proceed to a trial of their action. I make this point as it has a bearing on the approach and the principles I should apply in considering how discretion is to be exercised in this case because in those instances where the grant of a mandatory injunction would have the abovementioned result, the courts have as a matter of caution and to prevent injustice insisted on a high degree of assurance that a plaintiff would be able to establish his right at a trial before it would grant such an injunction. Thus it is only in those exceptional cases where the court is confident that there is an unusually strong and clear case that a similar injunction will be granted at the trial that a mandatory injunction is granted at an interlocutory stage. See *Tinta Press Sdn Bhd v. Bank Islam Malaysia Bhd* [1987] 2 MLJ 193, *Roxy Electric Industries (K) Bhd v. Syarikat Nominee Bumiputra Sdn Bhd* [1989] 3 MLJ 231 and *Cayne v. Global Natural Resources plc* [1984] 1 AER 225.

Since the grant of a mandatory injunction in this case will result in the income attributable to the assets of the estate of the deceased being preserved until the outcome of the case, the particular facts of this case requires that the approach I should adopt in considering whether or not to grant the mandatory injunction is not to insist on a higher degree of assurance but instead adopt the approach commended to judges in the case of *Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 193; where the Court of Appeal set out the following as matters a judge should focus his mind on in hearing an application for interlocutory injunctions firstly, whether the totality of the facts presented discloses a *bona fide* serious issue to be tried secondly, if the issues disclosed require further investigation, a judge must then consider where the justice of the case lies and in making his

assessment must take into account all relevant matters including the practical realities of the cases and thirdly, the judge must have at the forefront of his mind that the remedy he is asked to administer is a discretionary one, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the *status quo*.

With the above in mind, I now turn to consider the application.

Is There A Serious Issue To Be Tried?

On the totality of the evidence presented including the submissions of counsel, I find there are *bona fide* serious issues raised which require further investigation. These issues arise out of one question which is central to this whole case, namely, did the deceased die leaving a will or did he die intestate? The above question give rise to the following subsidiary issues: if the deceased left a will is it valid; if it is, what are its terms and who are the persons entitled to receive under it.

The above issues have arisen as a result of the defendants' assertion that when the deceased passed away, he left a will written in the Chinese language by which the deceased allegedly left his property to the defendants to the exclusion of the plaintiffs. The plaintiffs dispute this and deny the validity of the will including that the signature of the deceased thereon is a forgery. Counsel for the plaintiffs also stated during submission on the question of *locus standi* that a perusal of the alleged will shows that there is nothing in it to support the defendants' contention that they are the sole beneficiaries named in the said will and that the said lands have not even been identified in the will.

The translation of the will supplied by the defendants is far from satisfactory but a perusal of it shows that what the plaintiffs say about it is not without basis. It is also to be observed that the alleged will is a four paged document, p. 1 of which mentions that it is an amendment to a property agreement dated 3 October 1997 and p. 4 of which indicates that it is an agreement made on 3 October 1997 which names certain individuals and the share attributed to them but not to any property or who the executors are.

Having identified the questions that call for further investigation, I move on to consider where the justice of the case lies.

Justice Of The Case

The situation that prevails presently is that whereas the defendants assert the existence of a will of which they are the alleged beneficiaries, the will names no executors, the defendants have taken no steps to be appointed executors

thereof or to obtain administration of the same. The defendants say they intend to apply for probate and will do so once they have obtained a translation of the will from the court which they requested for on 26 April 1999. It is now over a year since the deceased passed away but the defendants do not say why they could not have obtained a translation sooner. The practical reality of the situation is that without having taken any steps to clothe themselves with the necessary authority to deal with the assets of the deceased, the defendants have nevertheless taken possession of the assets and treated them as if they were their own. The defendants boldly state in their affidavit (encl. 20) that they are entitled to do what they do because of the existence of the will. The defendants also admit that they have paid the income derived from the sale of palm oil and fruit produce into the account of Hong Heng and that they need not account to the plaintiffs for the monies that have come into their hands.

In the situation that now presents itself, it is not difficult to weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. In my judgment, the harm resulting from the refusal of the injunction far outweighs any harm that might be caused by its grant because until the question of whether the deceased died testate or not is finally settled, it would be inequitable and wrong to allow the defendants to enjoy possession of the said lands and to appropriate the income therefrom to themselves as now being done. Nobody but the defendants know how much money is coming into their hands as they refuse to account for the same. On the other hand, a grant of the injunction would result in all proceeds of sale being paid into a joint account in the name of both the plaintiffs and defendants as a result of which the income is preserved to await the outcome of the suit. In considering the question of harm, I have taken into account the fact that the plaintiffs have given an undertaking in damages but I find that as the injunction will result in all proceeds of sale being paid into a joint account, the question of the financial standing of the plaintiffs does not assume any importance. As opposed to that, to allow the defendants to continue in possession of the said lands and to collect the income therefrom immediately calls into question the financial ability of the defendants to pay over all sums of money that they may be finally accountable for. On the material before me, I cannot say with any confidence what the financial ability of the defendants are and whether they will be able to meet damages that may be awarded against them because apart from a bare statement made in their affidavit of 11 May 1999 that they are financially able to pay any damages if required, no attempt has been made to say or demonstrate how or on what basis the defendants are financially able to do so.

Discretionary Considerations

In submission, counsel for the defendants urged me not to grant the orders sought for the following reasons: firstly, since there is a will, to grant an injunction would amount to the court displacing the authority of the executors or administrators. Counsel relied on the case of *Sivanendran v. Markandoo & Anor v. Dr Mahendran Markandoo* [1988] 2 MLJ 169. I regret I find no merit in this submission as the defendants have not been named executors nor appointed executors or administrators and clearly the facts of our case are distinguishable from that in the case of *Sivanendran v. Markandoo*.

Secondly, the defendants submit that damages are an adequate remedy. The loss to the plaintiffs is purely financial and quantifiable wherefore the payment of damages will adequately compensate the plaintiffs for any loss suffered, and, the defendants are financially able to pay damages if required. I regret I am unable to agree with this submission. I have already expressed my doubts as to the financial standing of the defendants. In addition to that, whilst the defendants say the loss is quantifiable, they resolutely refuse to account for the income from the said lands and all the moneys that have come into their hands with the result that the very process of quantification becomes questionable. In these circumstances the submission that damages are an adequate remedy rings hollow.

Thirdly, the defendants submit the balance of convenience does not favour the grant of an injunction in that the defendants' business and earnings will be disrupted which in turn would cause them inconvenience and hardship which the court should be slow to do especially as the defendants have expended large sums of money on the said lands, the court should therefore maintain the *status quo*. I regret I cannot agree with these submissions. To me, the *status quo* that needs to be preserved in this case is the position that prevailed at the date of the death of the deceased before the acts complained of began. As acknowledged and admitted by the defendants, they took over the assets of the estate only after the death of the deceased. To now argue that the court should allow the present *status quo* to continue because it is presented with a *fiat accompli* by the defendants is untenable. As regards the claim that the defendants have spent large sums of money on the said lands, I find this has not been established in evidence. The defendants have exhibited several bills made out in the Chinese language. Unfortunately, I cannot use these documents in these proceedings in view of the requirement of O. 92 r. 1 that all documents required for use in pursuance of the rules shall be in the national language. Even if what the defendants say regarding expenditure on the said lands is true, I cannot ignore the fact that the defendants are in receipt of all the income from the said lands and are therefore in a position to recoupe any alleged expenditure. As regards the hardship that the defendants will allegedly

suffer if their business and earning are disrupted, I agree with counsel for the plaintiffs that the only hardship that the defendants would suffer is that they cannot pocket the money as they now do. Besides that, it is my view that the defendants have brought upon themselves any hardship they may suffer by embarking on the course they have. In so far as operations of the plantations is concerned, counsel for the plaintiffs points out that there will be no disruption as the plaintiffs will continue to run the plantations if the injunction is granted.

Fourthly, the defendants submit the plaintiffs have delayed for about a year in commencing these proceedings without any explanation for the same. During this period, the defendants have started to manage the said lands and expended money on the same, to now grant the injunction would cause maximum disruption to the business. For the reasons already given above I do not believe that the operations on the plantations will be unduly interrupted as claimed. Whilst I do agree that the plaintiffs have delayed in bringing these proceedings, I do not feel that for this one reason the injunction should be refused because I find that the defendants have not been unduly prejudiced by the delay. Instead the defendants have benefited from it by being left alone to collect and utilise the income from the said lands for all this while. I accordingly find that when all matters are looked at in totality, the delay factor is outweighed by the other considerations warranting the grant of an injunction.

For all the reasons abovestated, I find that the justice of this case requires the grant of the plaintiffs' application for injunctive relief. I accordingly order that the plaintiffs' application for injunction be granted in terms. The interim order is discharged from the date hereof.

With regard to the plaintiffs' application for an account, it is their case that until the will has been proved and probate in respect thereof granted to the defendants, the defendants have no legal authority to take possession of the assets of the estate of the deceased and to collect and enjoy the income therefrom. In having done so, the defendants are liable to account for all monies that have come into their hands. The defendants on the other hand say that they are fully justified and entitled to do what they have done and will continue to do because they are the beneficiaries under the will of the deceased by which the properties of the deceased, which expression according to the defendants includes the said lands, were left to the defendants. Accordingly, the defendants are not accountable to the plaintiffs for the income derived from the said lands. It was also the submission of counsel for the defendants that since the deceased left a will in which none of the plaintiffs are named as beneficiaries, their right to claim any interest in the said lands is far from clear or settled and this constitutes a preliminary question to be tried so that by reason of O. 43 r. 1(1) Rules of the High Court (RHC), no

order for accounts should be made. The defendants are accordingly not an accounting party who are obliged to render any accounts to the plaintiffs. In support the case of *Tang Eng Choon v. Foo Kain Yeun & Anor* [1988] 1 MLJ 531 was cited.

Order 43 r. 1(3) RHC reads:

> On the hearing of the application, the Court may, unless satisfied by the defendant by affidavit or otherwise that there is some preliminary question to be tried, order that an account be taken and may also order that any amount certified on taking the account to be due to either party be paid to him within a time specified in the order.

I find that the argument put forward by counsel for the defendant would have some force if he could show that they are named executors or probate of the will had been granted to the defendants for, in my judgment, it is only then that the defendants will be entitled to say that they are legally entitled to deal with the assets of the deceased and that for the plaintiffs to call for an account, they must first establish that they have a sufficient interest under the will to be able to call for an account. As the defendants cannot show that they have any legal authority to deal with the assets of the deceased the defendants are in no better position than the plaintiffs, that is, they are all beneficiaries to the estate of the deceased. No preliminary question arises at this point of time.

It follows from what I have said above that I have not found the case of *Tang Eng Choon* of any relevance or assistance in our case because the issues and the facts involved in that case are quite different from those in ours.

For the reasons above stated, I find that on the facts before me there are sufficient reasons to grant the plaintiffs' application for account in the terms requested. I will hear the parties on the directions I should make on the order I have granted on a date to be fixed by the Deputy Registrar.